house, the servant's quarters and house No. 9 appeared to be on one lot. It is clear that the letting to the defendant was not by lot. On the balance of probabilities, it is more probable that the landlord's representative never discussed the boundary of house No. 9 with the defendant and did not tell the defendant that the boundary was up to the steps. I find that the letting to the defendant of No. 9 Scotts Road included the area on which the two outhouses stand."

It seemed to me that the finding of the trial judge was perfectly justified. In his evidence the defendant said that the Indian representative of the landlord indicated to him in 1945 when he rented house No. 9 that the boundary of No. 9 was at the bottom of the steps. It was obvious that this piece of evidence was not true because, later in his evidence, the defendant said that he did not know the boundary of No. 9 until Vermont Realty bought Lot 5[6] in October, 1962.

In my view the plaintiff duly discharged the onus on him. My reasoning is as follows. House No. 9 was let to the defendant in September, 1945, by Seethai Achi. His possession of the disputed area as part of his holding was not adverse to the landlord. Possession is not adverse unless it is inconsistent with the title of the true owner. The earliest date on which the defendant's possession could be said to have been adverse to the plaintiff's predecessors in title was when the trustees of the estate of Arunasalam Chettiar sold Lot 5[6] to Mohamed bin Abdul Aziz in September, 1960. The right of action of the plaintiff's predecessors in title to recover the disputed area accrued at the date of that sale. That right of action arose within twelve years preceding the commencement of the action brought by the plaintiff.

The defendant failed to prove what, in effect, was alleged by him in his pleading, namely, that he took adverse possession of the disputed area before the 2nd October, 1951.

It was for the above reasons that I came to the conclusion that the appeal should be dismissed with costs.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Chung & Co.; L. A. J. Smith.*

IN RE XY & CO.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Ambrose J.) October 26, 1966]

[Singapore — Federal Court Civil Appeal No. Y4 and Y5 of 1966]

Income Tax — Case stated for opinion of High Court — High Court remitting case to the board with its opinion — Whether this is a judgment or order of High Court — Whether Federal Court has jurisdiction to hear appeal from such opinion — Court of Judicature Act, 1964, s. 67 — Income Tax Ordinance (Cap. 166), s. 82.

The question for decision in this case was whether the Federal Court has jurisdiction to hear an appeal from the opinion of the High Court ([1966] 2 M.L.J. 11) delivered under section 82 of the Income Tax Ordinance.

Held: the jurisdiction exercised by the High Court under section 82 of the Income Tax Ordinance is only consultative and not judicial so long as it does no more than remit the case to the board with its opinion. Such an opinion is not a judgment or order within the meaning of section 67 of the Courts of Judicature Act, 1964. Therefore the Federal Court has no jurisdiction to hear an appeal from the opinion of the High Court delivered under that section.

Cases referred to:—

(1) *Ex parte Dawes; In re Moon* (1886), 17 Q.B.D. 275.

(2) *In re Knight and Tabernacle Permanent Building Society* [1892] 2 Q.B. 613.

(3) *Onslow* v. *Commissioners of Inland Revenue* (1890), 25 Q.B.D. 465.

(4) *Ex parte County Council of Kent* [1891] 1 Q.B. 725.

FEDERAL COURT.

S. H. D. Elias for the appellant in Civil Appeal No. Y 4 of 1966.

L. A. J. Smith for the appellant in Civil Appeal No. Y 5 of 1966.

G. S. Hill for the respondent.

Ambrose J.: The question for decision is whether this court has jurisdiction to hear an appeal from the opinion of the High Court delivered under section 82 of the Income Tax Ordinance. The question arises in this way. The Board of Review stated a case on certain questions of law for the opinion of the High Court under section 82 of the Income Tax Ordinance. The High Court remitted the case to the board with its opinion. The appellants being dissatisfied with the opinion appealed to this court against the opinion. The respondent to both the appeals is the Comptroller of Income Tax. He applies to this court to set aside the notices of appeal filed by the appellants and to stay all further proceedings. The ground of the application is that this court has no jurisdiction to hear an appeal from the opinion of the High Court.

It is to be noted that the Income Tax Ordinance does not provide for a right of appeal against an opinion of the High Court delivered under section 82 of the Ordinance. If it were intended by the legislature that such an opinion should be the subject-matter of an appeal, one would expect such an intention to be explicitly stated in the Ordinance.

The appellants rely on section 67 of the Courts of Judicature Act, 1964. This section provides that the Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its

original or its appellate jurisdiction.

The first argument submitted on behalf of the appellants is this. Section 82(6) of the Income Tax Ordinance provides that the High Court shall hear and determine any question of law arising on a stated case and may in accordance with its decision thereon confirm, reduce, increase or annul any assessment determined by the board in the appeal, or may remit the case to the board with the opinion of such court thereon. It is said that it is clear from this subsection that the determination of a question of law arising on a stated case is a decision by the High Court. I think this must be conceded. Counsel goes on to say that the determination by the High Court is an order of the High Court. Counsel relies on *Ex parte Dawes, In Re Moon* [1] at page 284. There a special case was stated for the opinion of the High Court under section 97(3) of the Bankruptcy Act, 1883. That subsection provided:—

'If any question of law arises in any bankruptcy proceeding in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court may desire, to have determined in the first instance in the High Court, the judge shall state the facts, in the form of a special case, for the opinion of the High Court."

The High Court gave its opinion. An appeal was brought against the opinion under section 104(2)(b) of the Bankruptcy Act, 1883, which provided for an appeal from an order of the High Court to the Court of Appeal. Lord Esher M.R. said that the first effective order was made by the High Court sitting in bankruptcy and that from that order an appeal lay to the Court of Appeal. As regards *Ex parte Dawes, In Re Moon,* Lord Esher M.R. had this to say subsequently in *In Re Knight and Tabernacle Permanent Building Society,* [2] at page 617:—

"In the bankruptcy case to which our attention was directed, the statute spoke of a question of law to be determined by the court. It was held that, although the Act did not in terms provide for any judgment or order of the court, inasmuch as the court was to determine the matter, there was what was equivalent to a judgment or order of the High Court."

In *Ex parte Dawes, In Re Moon,* the Court of Appeal considered the language of section 97(3) of the Bankruptcy Act, 1883, looked at its context, and took the view that the determination by the High Court was equivalent to an order of the High Court under section 104(2)(b), because the jurisdiction of the High Court was not merely consultative. It seems to me that not every determination by the High Court is an order of the High Court, or is equivalent to such an order. The language of the section under which the case is stated and the context of the section have to be carefully considered.

The second argument submitted on behalf of the appellants is that the determination by the High Court is a decision of the High Court, that every decision of the High Court is a judgment or order, and that as the decision in question was not obtained in an action it is an order. The case cited is *Onslow* v. *Commissioners of Inland Revenue,* [3] where Lord Esher M.R. said at page 466:— "A judgment, therefore, is a decision obtained in an action, and every other decision is an order." In that case it was held by the Court of Appeal that the decision of a Divisional Court upon a case stated by the Commissioners of Inland Revenue under section 19 of the Stamp Act, 1870, is an order, and not a judgment, and an appeal from such decision to the Court of Appeal must be brought within twenty-one days. That case was a decision on Order LVIII, r. 15, which provides:—

"No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

In the present case what the court has to consider is the meaning of "judgment or order" in section 67 of the Courts of Judicature Act, 1964. If a decision not obtained in an action is an order for the purposes of Order LVIII, r. 15, it does not follow that every decision not obtained in an action is an order for the purposes of section 67 of the Courts of Judicature Act, 1964.

In my view, the jurisdiction exercised by the High Court under section 82 of the Income Tax Ordinance is only consultative and not judicial so long as it does no more than remit the case stated to the board with its opinion. If the High Court, after determining the questions of law arising on the case stated, goes on to confirm, reduce, increase or annul any assessment determined by the board, it would be exercising its judicial jurisdiction. As to the distinction between consultative jurisdiction and judicial jurisdiction, it is necessary to turn to the case of *Ex parte County Council of Kent,* [4] which is cited by counsel for the respondent. In that case the Court of Appeal was concerned with section 29 of the Local Government Act, 1888. That section provides:—

"If any question arises, or is about to arise, as to whether any business, power, duty or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as subject to any rules of court may be directed by the court; and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question."

The Court of Appeal consisting of Lord Halsbury L.C., Lord Esher M.R. and Fry L.J., said in a written judgment prepared by Lord Halsbury:—

"If the thing appealed from becomes a judgment or order, a decree or rule of the High Court, it would of course be appealable under section 19 of the (Judicature) Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used.

Now the language of section 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe present), is to be decided by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject-matter dealt with in the section, they certainly imply no right of appeal.

. . . . . .

Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is 'decision'.

. . . . . .

And now, dealing with the subject-matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative."

In short, the Court of Appeal decided that the jurisdiction of the High Court upon questions submitted to it under section 29 of the Local Government Act, 1888, was consultative only, and not judicial; that, therefore, the decision of the High Court was not a judgment or order, a decree or rule of the High Court, or something filling the character of a judgment or order, decree or rule; and that, for that reason, no appeal lay from the decision of the High Court to the Court of Appeal under section 19 of the Judicature Act, 1873.

This case was explained by Lord Esher M.R. in the case of *In Re Knight and Tabernacle Permanent Building Society*,[2] at page 617 as follows:—

"In the case of *Ex parte County Council of Kent*, where a statute provided that a case might be stated for the decision of the court, it was held that, though that language might *prima facie* import that there was to be the equivalent of a judgment or order, yet, when the context was looked at, it appeared that the jurisdiction was only consultative and that there was nothing which amounted to a judgment or order."

It is contended on behalf of the appellants that the jurisdiction exercised by the High Court when it remits the case stated to the board with its opinion under section 82 of the Income Tax Ordinance is not merely consultative, because under subsection (6) the board is bound by the opinion of the High Court and shall give effect thereto by its decision. The answer to this contention is that where the High Court merely remits the case stated to the board with its opinion it is the board which has to give a decision. Section 81(2) of the Income Tax Ordinance provides a right of appeal to the High Court from the decision of the board upon any question of law or of mixed law and fact. Section 81(4) says:—

"The High Court shall hear and determine any such appeal and may confirm, reduce, increase, or annul the assessment determined by the board, and make such further or other order on such appeal, whether as to costs or otherwise, as to such court may seem fit."

Section 81(5) says:—

"There shall be such further right of appeal from decisions of the High Court under this section as exists in the case of decisions made by such court in the exercise of its original civil jurisdiction."

It is said that, if after the board has given effect to the opinion of the High Court delivered under section 82 of the Ordinance and an appeal is brought against the decision of the board to the High Court under section 81, it will not be open to the High Court to say that the board has gone wrong because the board merely did what it was bound to do. I do not think this is correct. It seems to me that the High Court has full jurisdiction to decide whether the decision of the board was right or wrong even though that decision was given in accordance with an opinion of the High Court.

For the above reasons I come to the conclusion that this court has no jurisdiction to hear an appeal from the opinion of the High Court delivered under section 82 of the Income Tax Ordinance so long as the High Court does no more than remit the case stated to the board with its opinion. Such an opinion, although it is a decision, does not amount to a judgment or order within the meaning of section 67 of the Courts of Judicature Act, 1964. I would therefore set aside the notices of appeal filed by the appellants and stay all further proceedings in the appeals and order the appellants to pay the respondent the costs of the applications.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Notices of appeal set aside. Further proceedings stayed.

Solicitors: *Elias Bros.; L. A. J. Smith; Rodyk & Davidson.*

HOONG CHIN WAH v. CHEAH KUM SWEE & ANOR.

[F.C. (Barakbah L.P., Azmi C.J. and Chang Min Tat J.) October 29, 1966]

[Ipoh — Federal Court Civil Appeal No. 383 of 1964]

Practice and Procedure — Appeal — Appeal based on claim abandoned at the trial — Discretion of court — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 8(4) and (5).

The appellant in his appeal sought to rely on a claim which had been abandoned by him at the trial. The respondents urged that the appellant should not be allowed to proceed with the appeal on grounds which had been abandoned.